No. 18681

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HEINRICH FRITZ BACHMANN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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HEINRICH FRITZ BACHMANN,

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BRIEF FOR APPELLEE.

Jurisdiction.

The court below had jurisdiction of appellant's petition for naturalization pursuant to Section 310(a) of the Immigration and Nationality Act, 8 U. S. C. A. §1421(a). On April 3, 1963 the District Court entered its judgment [R. 63][1] denying appellant's petition for naturalization, and on April 10, 1963 appel-

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[1]The Transcript of Record filed in this Court on May 17, 1963 consists of two Volumes. Volume I is numbered consecutively from pages 1 through 74, and "R" refers to these page numbers. All of appellant's exhibits are contained in Vol. I of the Transcript of Record [R. 51-55]; and Exhibit "A" of appellee is also contained in this volume [R. 2-8].

Exhibits "B" and "C" of appellee are not contained in the Transcript of Record, but are being considered by this Court in their original form. Contained in Exhibit "C" are records of the Selective Service System relating to appellant, which records have been marked Exhibits 1-A [or 1 (A)] through 1-N [or 1 (N)]. The Selective Service Exhibits contained in Exhibit "C" will be indicated "SS Ex. 1-B", "SS Ex. 1-C", etc.

lant filed a Notice of Appeal therefrom [R. 64]. This Court has jurisdiction of the present appeal pursuant to Title 28, U. S. Code, Section 1291.

Appellant was born in Zurich, Switzerland on November 4, 1927 [R. 10]. He was admitted to the United States for permanent residence on December 27, 1952 [Ex. B, Item 9]. At the time of his admission appellant was able to read, write, and speak English, having studied English in school, and having been employed in Switzerland as a passenger or ticket agent with an airline, where as a part of his duties he carried on conversations with passengers in English when necessary [R. 10-11]. After entering the United States appellant resumed his duties as ticket agent with the airline [R. 11].

On June 19, 1953 appellant registered for the draft, and on July 7, 1953 he was classified I-A [SS Exs. 1-B and 1-C]. On August 24, 1953 appellant reported for physical examination and was found qualified for service in the armed forces [SS Ex. 1-C].

On September 10, 1953 appellant wrote a letter to his local draft board, which, among other things, quoted from the treaty between the United States and Switzerland providing that "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service", requested exemption from military service, and suggested a personal appearance before the Board [SS Ex. 1-D].

On September 18, 1953 appellant was notified to appear for an interview on September 22, 1953 [SS Ex. 1-C]. Appellant appeared on the latter date but did not sign the statement requesting exemption as a treaty alien, stating that he could not decide whether or

not to sign the statement, but that he would advise the Board by letter in a few days [SS Exs. 1-C and 1-E].

On October 2, 1953 appellant was ordered to report for induction on October 19, 1953 [SS Exs. 1-C and 1-F]. Meanwhile, appellant had written to Representative Lester Holzman concerning his induction, which letter had been referred to National Headquarters, Selective Service System. On October 5, 1953 Lewis B. Hershey, Director, Selective Service System, replied to Representative Holzman, which letter, among other things, referred to Section 315 of the Immigration and Nationality Act[2] and its provisions.

On October 6, 1953 Representative Holzman wrote to appellant enclosing a copy of the letter which he had received from Mr. Hershey, and suggesting that his case be discussed with the State Director of Selective Service in New York City [R. 53]. On October 7, 1953 appellant appeared at the office of the State Director. This interview is summarized in a letter dated October 8, 1953 to Representative Holzman, which states in part [SS Ex. 1-G]:

> "* * * After a long talk with Mr. Bachmann, he finally advised Colonel Akst that he thought he was entitled to a IV-C classification based upon his Swiss alien status in view of the international treaty existing between our nations. However, he refused to sign the statement the Local Board has been using for all treaty aliens. He was thereupon advised that he could make up his own statement and he would be eligible for a IV-C classification

[2]For brevity Section 315 of the Immigration and Nationality Act will sometimes be referred to hereinafter as 315 INA.

> but that he would be either given or mailed the Section 315 of the McCarran Act. Also, his file would reflect that he was given the IV-C classification based upon his treaty status *and he was apprised of the aforementioned section.*" (Emphasis added.)

On October 9, 1953 appellant filed in person with his local draft board a letter which read as follows [SS Ex. 1-H]:

> "I am a Swiss alien who desires exemption from military service on the ground that I come from a country with which the United States has a treaty exempting its subjects."

At the time that appellant filed the above quoted letter he was given a copy of Section 315 of the Immigration and Nationality Act [SS Ex. 1-C].

On October 13, 1953 appellant was classified IV-C and by letter dated October 14, 1953 appellant was advised by his local board "that by reason of your reclassification to 4-C, your Order To Report for Induction on October 19, 1953 is hereby cancelled: [SS Exs. 1-C and 1-I].

On October 15, 1953 appellant appeared at his local board and asked if he would be classified 5-A upon reaching his 26th birthday and was told that he would. He also said, among other things, that he wanted to be classified as a conscientious objector [SS Ex. 1-J].

On October 23, 1953 appellant wrote a letter to his local board in which he stated, *inter alia,* that "I herewith appeal to you to change my classification to I-O

by reason of the fact that I am a conscientious objector" [SS Ex. 1-K]; and he later completed and sent to his local board a Special Form For Conscientious Objector [SS Ex. 1-N]. On November 24, 1953 the local board determined that "Information does not warrant reopening" [SS Ex. 1-C], and on December 7, 1963 forwarded appellant's file to the appeal board [SS Ex. 1-L]. Meanwhile, on November 4, 1953 appellant had become 26 years of age; and on December 29, 1953 the Appeal Board classified him 5-A [SS Ex. 1-L]. At no time has appellant entered or served in the armed forces of the United States [R. 24, 25].

On January 3, 1962 appellant filed in the court below his petition for naturalization. The naturalization examiner recommended that the petition be denied [R. 8]; and the District Court, after a trial, entered its Findings of Fact, Conclusions of Law and Judgment [R. 62-63], denying appellant's petition for naturalization on the ground that he had "failed to establish that he is not ineligible for citizenship by virtue of the provisions of Section 315 of the Immigration and Nationality Act" [R. 63]. The present appeal is from that judgment.

Issues Presented.

1. Was appellant relieved from training or service in the Armed Forces of the United States because he was an alien?

2. Did the District Court err in placing the burden upon appellant to establish that he was eligible for naturalization under Section 315 INA?

3. Were the safeguards of the Fifth and Sixth Amendments to the Federal Constitution required in determining whether appellant was eligible for naturalization under Section 315 INA?

4. Did appellant have an opportunity to make an intelligent election between exemption and no citizenship, and no exemption and citizenship?

5. Were the findings of the District Court sufficient?

6. Was appellant entitled to exemption from military service as a treaty alien?

7. If appellant was not entitled to exemption as a treaty alien, is Section 315 INA nevertheless applicable?

Treaties, Statutes and Regulations.

Article II of the Treaty of 1850 between the United States and Switzerland, 11 Stat. 587, 589, provides in part:

> "The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required, by way of compensation, from citizens of the country where they reside, who are exempt from the said service.
>
> * * *"

Section 315 of the Immigration and Nationality Act, 66 Stat. 242, 8 U. S. C. A. §1426, provides:

> "Sec. 315. (a) Notwithstanding the provisions of Section 405 (b), any alien who applies or has

applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability for training or service because he was an alien."

Executive Order No. 10292 of September 25, 1951, 16 F. R. 9843, 9852, 32 C. F. R. §1622.42, and §1622.50 provided in part:

"§1622.42 Class IV-C: *Aliens.* * * *

(c) In Class IV-C shall be placed any registrant who is an alien and who is certified by the Department of State to be, or otherwise establishes that he is, exempt from military service under the terms of a treaty or international agreement between the United States and the country of which he is a national.

* * *

"§ 1622.50 Class V-A: *Registrant over the age of liability for military service.* (a) In Class V-A shall be placed every registrant who has attained the twenty-sixth anniversary of the day of his birth, except (1) those registrants who are

in active military service in the armed forces and are in Class I-C, (2) those registrants who are performing civilian work contributing to the maintenance of the national health, safety, or interest in accordance with the order of the local board and are in Class I-W, (3) those registrants who have consented to induction, and (4) those registrants who on June 19, 1951, or at any time thereafter, were deferred under the provisions of section 6 of title I of the Universal Military Training and Service Act, as amended. Except as is otherwise provided in this paragraph, registrants who prior to attaining the twenty-sixth anniversary of the day of their birth have been classified in some other class shall, as soon as practicable after attaining the twenty-sixth anniversary of the day of their birth, be reclassified into Class-V-A.

* * *"

ARGUMENT.

I.

Appellant Was Relieved From Training and Service in the Armed Forces Because He Was an Alien.

The records of the Selective Service System show that on October 2, 1953 appellant was ordered to report for induction on October 19, 1953 [SS Exs. 1-C and 1-F]; that on October 9, 1953 he applied for exemption from military service on the ground that he was a treaty alien [SS Ex. 1-H]; that on October 13, 1953 he was classified IV-C [SS Ex. 1-C]; and that by letter dated October 14, 1953 he was notified "that by reason of your re-classification to 4-C your Order to Report For Induction on October 19, 1953 is hereby cancelled" [SS Ex. 1-I]. These records also show that appellant remained in a IV-C classification from October 13, 1953 until December 29, 1953, when he was classified V-A [SS Exs. 1-B, 1-C, and 1-L]. Appellant admits that he has never served in the armed forces of the United States [R. 24, 25].

The records of the Selective Service System are conclusive as to whether an alien was relieved from liability for training or service because he was an alien [§315(b) of the Immigration and Nationality Act; 8 U. S. C. A. §1426(b)]; and appellee submits that under the circumstances of the present case appellant was so relieved [*Cf. Petition of Skender,* 248 F. 2d 92 (2d Cir. 1957), cert. den. 355 U. S. 931]. As this Court in *Ungo v. Beechie,* 311 F. 2d 905 (9th Cir. 1963), cert. den. 373 U. S. 911, declared (p. 906):

> "* * * factually speaking, the action by the draft board in classifying petitioner in category IV-C as a treaty alien relieved him of service in the army * * *"

Appellant's so-called appeal[3] and his later classification on December 29, 1953 to V-A will not aid him. In the first place, it is doubtful whether appellant's letter of October 23, 1953 [SS Ex. 1-K] constituted a proper appeal; since it sought a classification as a conscientious objector, which had not previously been sought before the local board. It should be noted that the local board felt that reopening was not warranted [SS Ex. 1-C; see also 32 C. F. R. Part 1625 concerning Reopening].

In the second place, after appellant attained the age of twenty-six he was required by law to be placed in Class V-A. On December 29, 1953, 32 C. F. R. 1622.50 provided in part:

> "* * * Except as is otherwise provided in this paragraph, registrants who prior to attaining the twenty-sixth anniversary of the day of their birth have been classified in some other class shall, as soon as practicable after attaining the twenty-sixth anniversary of the day of their birth, be reclassified into Class V-A."

Appellant reached his 26th birthday on November 4, 1953; consequently, on December 29, 1953 when the appeal board rendered its decision, his appeal had in effect become moot; since under the above-quoted regulation appellant was required by law to be classified V-A. Thus the decision of the appeal board

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[3]Appellant filed this "appeal" [SS Ex. 1-K] after he had been informed that he would be classified V-A upon reaching his 26th birthday [SS Ex. 1-J].

merely reflected this mandatory requirement[4]; and the provisions of 32 C. F. R. 1626.25 upon which appellant relies (Br. 7-8) do not appear to be relevant.[5]

Appellant seems to contend (Br. 8) that the refusal during February, 1954 of a permit for him to leave the United States [R. 51-52] shows that he was not relieved of training or service. This argument presupposes that one so relieved is beyond all jurisdiction of the Selective Service laws. This would not seem to be true. Even if appellant had continued in Class IV-C, he would nevertheless have remained a registrant; and as such would appear to come within 32 C. F. R. 1621.-16 regulating permits to leave the United States.

In any event, the refusal of a permit to leave the United States is a far cry from those decisions which hold that an alien who actually serves in the armed forces, after having previously been classified as exempt upon his application, has not been effectively relieved from service [*United States v. Lacher,* 299 F. 2d 919 (9th Cir. 1962); *Petition of Rego,* 289 F. 2d 174 (3d Cir. 1961); *Cannon v. United States,* 288 F. 2d 269 (2d Cir. 1961); *United States v. Hoellger,* 273 F. 2d 760 (2d Cir. 1960)]. Appellant cannot bring himself within those decisions; since at no time has he served in the armed forces of the United States [R. 24, 25].

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[4]The appeal board had authority to make this required classification [See, 32 C. F. R. 1626.26].

[5]The court will note that the provisions of 32 C. F. R. 1626.25 quoted by appellant (Br. 7-8) were modified by Executive Order 10363 17 F. R. 5449, June 18, 1962.

II.

The District Court Did Not Err in Placing the Burden Upon Appellant to Establish That He Was Eligible for Naturalization Under Section 315 INA, and the Safeguards of the Fifth and Sixth Amendments Were Not Required.

Appellant contends that there was a denial of due process in placing the burden upon him to establish that he was eligible for naturalization under Section 315 INA. However, it is well established that the burden rests upon an applicant to establish that he has met the statutory qualifications to entitle him to the privilege of naturalization. [*United States v. Macintosh,* 283 U. S. 605 (1931); *United States v. Schwimmer,* 279 U. S. 644 (1929); *Sitler v. United States,* 316 F. 2d 312 (2d Cir. 1963); *Taylor v. United States,* 231 F. 2d 856 (5th Cir. 1956); *Allan v. United States,* 115 F. 2d 804 (9th Cir. 1940); *Lakebo v. Carr,* 111 F. 2d 732 (9th Cir. 1940)]. As the Supreme Court in *United States v. Schwimmer, supra,* pointed out (pp. 649-650):

> "* * * But aliens can acquire such equality only by naturalization according to the uniform rules prescribed by the Congress. They have no natural right to become citizens, but only that which is by statute conferred upon them. Because of the great value of the privileges conferred by naturalization, *the statutes prescribing qualifications and governing procedure for admission are to be construed with definite purpose to favor and support the Government.* And, in order to safeguard against admission of those who are unworthy or who for any reason fail to measure up to required standards,

the law puts the burden upon every applicant to show by stisfactory evidence that he has the specified qualifications.

* * * And when, upon a fair consideration of the evidence adduced upon an application for citizenship, doubt remains in the mind of the court as to any essential matter of fact, the United States is entitled to the benefit of such doubt and the application should be denied.

* * *" (Emphasis added).

Since naturalization is not a natural right, but a privilege, appellant's contention that he was entitled to "a prior criminal trial with all its incidents" (Br. 10) would seem to be completely without merit. The distinction between *Kennedy v. Mendoza-Martinez,* 372 U. S. 144 (1963), upon which appellant relies, and the present case, is clear. Mendoza-Martinez was a citizen of the United States by birth, and Section 401-(j) of the Nationality Act of 1940, as amended, would have divested him of this citizenship; while appellant is an alien seeking the privilege of American citizenship, and Section 315 INA merely imposes a condition upon the grant of that privilege.

Moreover, Section 315 INA does not impose punishment under the standards laid down in *Kennedy v. Mendoza-Martinez, supra,* and the prior case of *Trop v. Dulles,* 356 U. S. 86 (1958); since it is a reasonable exercise of the power of Congress to establish a uniform rule of naturalization [U. S. Const., Article I, Section 8, Clause 4; *cf. Perez v. Brownell,* 356 U. S. 44 (1958); see also, *Kahook v. Johnson,* 273 F. 2d 413, 414 (5th Cir. 1960)]. The statute cannot be con-

strued to impose punishment in the constitutional sense merely because of the incidental use by courts of the word "penalty" in construing it.

III.

Appellant Had an Opportunity to Make an Intelligent Election Between Exemption and No Citizenship, and No Exemption and Citizenship.

Appellant first indicated his desire to claim exemption as a treaty alien in his letter dated September 10, 1953 [SS Ex. 1-D], and following that letter he appeared before his local board for an interview on September 22, 1953 [SS Exs. 1-C and 1-E]. At this interview appellant stated that he "cannot decide whether or not he will sign the statement requesting exemption as Treaty Alien", but that he would "advise the Board by letter in a few days" [SS Ex. 1-E]. The logical inference is that appellant at his interview on September 22, 1953 was shown the standard form for application for exemption from military service [See, SS Ex. 1-G-1] or advised of its contents; and that his indecision at that time was created by the detriment that signing would impose, namely, a permanent bar to American citizenship.

However, this case need not rest on inference, since on October 5, 1953 the Director of the Selective Service System wrote to Representative Holzman, specifically calling attention to Section 315 INA and its provisions [SS Ex. 1-M; and R. 54]; and on October 6, 1953 Representative Holzman sent a copy of this letter to appellant [R. 53]. In addition, on October 7, 1953 appellant was interviewed at the office of the State Director of Selective Service, during which in-

terview he was apprised of Section 315 INA [SS Ex. 1-G]. And again on October 9, 1953 when he filed his application for exemption, he was handed a copy of Section 315 [SS Ex. 1-C; R. 22].

Appellant's high level of intelligence is indicated not only by his educational background [R. 10], but also by his employment [R. 10-11] and the caliber of his correspondence [see, *e.g.* SS Ex. 1-D]. He could read, write, and speak English when he first arrived in the United States [R. 10-11]. Under these circumstances, the District Court was not required to accept appellant's testimony that he "did not know what the consequences might be" if he applied for exemption on other than the prescribed form,[6] even though such testimony may have been unimpeached or not directly contradicted [*Quock Ting v. United States,* 140 U. S. 417 (1891), *Factor v. C. I. R.,* 281 F. 2d 100, 111 (9th Cir. 1960), cert. den. 364 U. S. 933; *Joseph v. Donover Co.,* 261 F. 2d 812 (9th Cir. 1958), and authorities cited therein; see also, *Guzman v. Pichirilo,* 369 U. S. 698, 702-703 (1962)]. As indicated above, this testimony was indirectly contradicted [See, SS Exs. 1-G and 1-M].

This case is readily distinguishable from *Moser v. United States,* 341 U. S. 41 (1951), upon which appellant relies (Br. 11). Moser was misled, and it was undisputed that he signed the application for exemption believing that he was not thereby precluded from citizenship, and that had he known claiming exemption would debar him from citizenship, he would not have claimed it, but would have elected to serve in the armed

[6]For another case in which the prescribed from was not used, see *Petition of Burky,* 161 F. Supp. 736 (E.D. N.Y. 1958).

forces" [341 U. S. at p. 45]. Here, however, there is ample evidence to show that appellant had an opportunity to make an intelligent election between exemption and no citizenship, and no exemption and citizenship, and that he knowingly and intentionally waived his rights to citizenship [*Cf. Ungo v. Beechie,* 311 F. 2d 903 (9th Cir. 1963), cert. den. 373 U. S. 911; *Hunter v. United States,* 302 F. 2d 363 (2d Cir. 1962); *Keil v. United States,* 291 F. 2d 268 (9th Cir. 1961); *Prieto v. United States,* 289 F. 2d 12 (5th Cir. 1961); *Kahook v. Johnson,* 273 F. 2d 413 (5th Cir. 1960); *Jubran v. United States,* 255 F. 2d 81 (5th Cir. 1958); *Petition of Skender,* 248 F. 2d 92 (2d Cir. 1957), cert. den. 355 U. S. 931].

IV.

The Findings of the District Court Were Sufficient.

Appellant contends that the District Court "erred in failing to make specific findings of fact as to whether under the facts of the case appellant had the opportunity to make an intelligent election between exemption and no citizenship, and no exemption and citizenship * * *" (Br. 5), relying upon this Court's decision in *Brunner v. Del Guercio,* 259 F. 2d 583 (9th Cir. 1958) (Br. 13). However, the court below found [Finding of Fact IV; R. 62]:

> "That the petitioner was informed by his local draft board of the provisions of Section 315 of the Immigration and Nationality Act (8 U. S. C. 1426) which provided that he would be ineligible

for naturalization if such exemption was granted to him for that reason."

Appellee submits that this finding is sufficient, although it is not in the precise language suggested in the *Brunner* decision (p. 586, footnote 3). This would seem to be particularly true in view of the rule, discussed in Part II, *supra,* that the burden rests upon an applicant to establish that he has met the statutory qualifications to entitle him to the privilege of naturalization. However, if this Court should determine otherwise, appellee submits that the case should be remanded so that the District Court may have an opportunity to make further findings; since there is ample evidence from which any findings necessary to support the denial of appellant's petition for naturalization could be made.

Appellant also complains that the District Court failed to make any specific finding as to whether appellant was a conscientious objector (Br. 5, 13). Such a finding was neither necessary nor proper. The only issue before the District Court was appellant's eligibility for naturalization under Section 315 INA; and a finding as to whether appellant was a conscientious objector would be neither relevant nor material. Moreover, appellant's classification under the Selective Service laws was confided to the executive branch (See, *The Universal Military Training and Service Act of 1951,* 65 Stat. 75, 50 U. S. C. App. (1952 Ed.) 451, *et seq.*; see also, 32 C. F. R. Parts 1622 and 1623).

V.

Appellant Was Entitled to Exemption From Military Service as a Treaty Alien, But Even If He Was Not, Section 315 INA Is Nevertheless Applicable.

By Executive Order No. 10292 of September 25, 1951, quoted under Treaties, Statutes and Regulations, *supra,* the President of the United States expressly provided for the exemption of treaty aliens; and appellee submits that the President had power to make this exemption [*Ungo v. Beechie* (9th Cir. 1963), cert. den. 373 U. S. 911; *Schenkel v. Landon,* 133 F. Supp. 305 (D. C. Mass. 1955)].

The case of *Petition of Rego,* 289 F. 2d 174 (3rd Cir. 1961), upon which appellant relies (Br. 14) is not persuasive; since the court reached its conclusion by construing Section 4(a) of the 1948 Selective Service Act, as amended. The court, however, impliedly recognized that a treaty alien who was a permanent resident would be barred under Section 315 INA, since it applied an entirely different reason for not enforcing that section.

Moreover, even if the executive order exempting treaty aliens was invalid, Section 315 should nevertheless be applied (*Ungo v. Beechie, supra; Petition of Carvajal,* 154 F. Supp. 525 (N.D. Calif. 1957); *United States ex rel. Rosio v. Shaughnessy,* 134 F. Supp. 217 (S.D. N.Y. 1954); *cf. Petition of Skender,* 248 F. 2d 92 (2d Cir. 1957), cert. den. 355 U. S. 931). As the Court in *Petition of Skender, supra,* pointed out (pp. 95-96):

> "* * * There is nothing in the language of that section to suggest that only those legally entitled

to be relieved shall be debarred: it is the fact of relief, not the legal right to it, that is determinative of the second prong of the condition. * * *

After all, if debarment from citizenship is deemed a just fate for an alien who sought and was accorded an exemption to which he was entitled, it is not unduly harsh for one who (a) sought an exemption to which he was entitled and (b) was accorded an exemption to which he was not entitled. Section 315(a) did not leave it open to the appellant to attack the validity of the very classification which he sought on the ground that when made it gave him an exemption to which he was not entitled. * * *

* * *"

VI.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the district Court denying appellant's petition for naturalization should be affirmed.

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Chief of Civil Section,

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Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES R. DOOLEY,
Assistant United States Attorney,
Attorneys for Appellee.